In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 990

THOMAS L. THAGGARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–32; Tr. 184) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1965 (Tr. 200). A petition for rehearing was denied on January 6, 1966 (Tr. 214). The petition for a writ of certiorari was filed on February 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of bank robbery in violation of 18 U.S.C. 2113(b).

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2. Whether the trial court's supplemental instructions in the nature of an *Allen* charge were erroneous.

STATUTE INVOLVED

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of violating 18 U.S.C. 2113(b). He was sentenced to imprisonment for 5 years (Tr. 180).

The evidence established that, on the morning of March 6, 1963, petitioner received his February bank statement which showed an erroneous balance in excess of $43,000.[1] Exhibiting the statement to an acquaintance, petitioner said "You don't make this kind of money in used car business" (Tr. 65–66). Petitioner went to the bank and asked the statement teller

[1] The bank had received two February deposits totalling approximately $43,000, for the account of the Alabama Power Company. As a result of a bookkeeping mistake, they were erroneously credited to the account of Alabama Motors Company owned by petitioner (Tr. 40–41, 68). Petitioner's actual balance was $649.17 (Tr. 44); his February deposits totaled only $1,504.19 (Tr. 46).

for the amount of his balance. After checking with the bookkeeper, the teller wrote the amount of $43,498.38 on a slip of paper and handed it to petitioner (Tr. 114–115). Shortly thereafter, petitioner made the same inquiry of the paying teller with the same result. Petitioner then said that he wished to withdraw $43,000, and presented to the paying teller his check for that amount (Tr. 27–28). Petitioner endorsed the check at the teller's request (Tr. 29). The teller called the bookkeeper to determine whether there were uncollected items against the account and then gave petitioner $43,000 in cash (Tr. 29–30).

Ten minutes after the transaction had occurred, the error was discovered. The bank officers sought unsuccessfully to locate petitioner (Tr. 67–70). That night, he was found and taken to police headquarters and to the bank, although he was not yet under arrest (Tr. 124, 71, 89). At the bank, he admitted that neither he nor anyone he knew made a $43,000 deposit to his account, and that the money did not belong to him (Tr. 92–93). He refused to say where the money was located. Although he promised to bring it to the bank the next day, he never returned the money (Tr. 93, 98–99).

The trial judge instructed the jury that an essential element of the crime charged (larceny) is a trespassory taking, that is, a taking without the owner's consent. The judge further charged that where the receiver of property has induced the transfer by knowingly taking advantage of the transferor's unilateral mistake that, too, could be a trespassory tak-

ing if the transferor retained title to the property[2] (Pet. App. 23–25). After the case had been submitted to the jury and its deliberations had proceeded into the second day (a total of approximately 5½ hours) the trial judge gave an instruction in the nature of an *"Allen charge," i.e.,* an instruction that it is "very desirable" for the jury to reach a verdict (Pet. App. 26, n. 2). Thereafter, in the hour following the *Allen* charge, the trial judge gave supplemental instructions on the law in the case in response to jurors' inquiries (Tr. 148–149, 149–151, 165–169). Approximately 40 minutes later, the jury reached its verdict.

The court of appeals affirmed petitioner's conviction. It noted that the trial judge had limited his instructions to common-law larceny (Pet. App. 23) as a result of his narrow construction of 18 U.S.C. 2113(b) (Pet. App. 21–23, 25); however, "Nothing said in the * * * charge increased the burden on appellant, but, rather, * * * it was considerably more beneficial to him than would have been a correct charge" (Pet. App. 25). In addition, the Court of appeals held that there was no error in the *Allen* charge (Pet. App. 26–27).

ARGUMENT

1. Petitioner's present assertion that he was prejudiced because the court of appeals' interpretation of

[2] Under the common law, if technical legal title passed in the transaction, the receiver could not be charged with larceny on the theory that his possession was not trespassory since he had become the owner of the property. Cf. *United States* v. *Rogers*, 289 F. 2d 433, 438 (C.A. 4).

Section 2113(b) was not charged to the jury is without merit. He successfully urged the trial court to construe Section 2113(b) as limited to common-law larceny while the government suggested the less restricted view ultimately accepted by the court of appeals (see Tr. 170–171). The broader theory—that any deliberate theft falls within the statute—eliminates the necessity of proving the added technical element of trespass. Inasmuch as the trial judge instructed the jury on trespass, petitioner clearly benefited and cannot complain. While there is a theoretical divergence between *United States* v. *Rogers,* 289 F. 2d 433 (C.A. 4), and the decision of the court below, further review is not warranted for it would not affect the outcome of this case. Moreover, the difference in approach taken by the Fourth and Fifth Circuits may well be without practical effect in view of the *Rogers* holding that facts such as those present here fall within the common-law definition of larceny.[3]

The evidence fully supports petitioner's conviction on either theory. Petitioner admittedly knew that he did not have $43,000 in the bank. His knowledge

[3] See 289 F. 2d at 438:

> "It has long been recognized, however that when the transferor acts under a unilateral mistake of fact, his delivery of a chattel may be ineffective to transfer title or his right to possession. If the transferee, knowing of the transferor's mistake, receives the goods with the intention of appropriating them, his receipt and removal of them is a trespass and his offense is larceny."

See, also, 2 Wharton's Criminal Law and Procedure (Anderson ed.), § 478, p. 129.

of the bank's error is indicated by his remark to an acquaintance as he showed him the bank statement. Petitioner's repeated requests for the amount of his balance could only have been intended to make certain that the bank had not discovered its mistake before he presented the check (which he had previously prepared). These circumstances, taken with his subsequent activities in thwarting recovery of the money, establish his intention to convert the bank's funds to his own use.

2. The form of "*Allen* charge" (*Allen* v. *United States,* 164 U.S. 492) given by the trial judge did not go beyond permissible bounds. There is no occasion to reexamine the *Allen* doctrine (see, also, *Lias* v. *United States,* 284 U.S. 584, affirming 51 F. 2d 215, 218 (C.A. 4); *Kawakita* v. *United States,* 343 U.S. 717, affirming 190 F. 2d 506, 521–528 (C.A. 9)), which the Court has declined to review this Term (*Walker* v. *United States,* 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859).

Petitioner's contention that the reference to the expense of "all trials" contaminated the instruction is not sound. The judge stated immediately that, while it was "therefore very desirable that a verdict should be reached," he did not "desire that any juror should surrender his conscientious convictions." He made every effort to insure that the jury was not confused on the law, giving supplemental instructions when requested and indicating his willingness to charge additionally if necessary. Cf. *Andrews* v. *United States,* 309 F. 2d 127 (C.A. 5), certiorari denied, 372 U.S.

946. Such a supplemental instruction was given subsequent to the *Allen* charge. In its context, and under the circumstances, the *Allen* charge was not coercive.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioner questions whether the trial court in its supplemental charge to the jury was required to charge additionally on the presumption of innocence and the burden of proof. The trial court previously instructed on those matters (Tr. 137–138), and it was not required to repeat the entire charge.

Petitioner also maintains that he was prosecuted by the State of Alabama for false pretenses. However, he was discharged from State custody prior to trial upon a writ of habeas corpus because (1) an accusatory affidavit was invalid and (2) the evidence taken at a preliminary hearing before a magistrate was held insufficient to support a charge of false pretenses. *Ex parte Thaggard,* 42 Ala. App. 229, 159 So. 2d 813, certiorari denied, 276 Ala. 117, 159 So. 2d 820. Thus, the government's policy against federal prosecution when an individual has been subjected to State prosecution for the same acts (which results in conviction or acquittal) does not apply to the present case.

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